

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RICHARD WAYNE WEBBER II,

Plaintiff,

vs.

NANCY A. BERRYHILL,

Acting Commissioner of Social Security,

Defendant.

No. 2:15-CV-00295-MKD

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

ECF Nos. 20, 25

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 20, 25. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion (ECF No. 20) and grants Defendant's motion (ECF No. 25).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted). The

1 party appealing the ALJ's decision generally bears the burden of establishing that
2 it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

3 **FIVE-STEP EVALUATION PROCESS**

4 A claimant must satisfy two conditions to be considered "disabled" within
5 the meaning of the Social Security Act. First, the claimant must be "unable to
6 engage in any substantial gainful activity by reason of any medically determinable
7 physical or mental impairment which can be expected to result in death or which
8 has lasted or can be expected to last for a continuous period of not less than twelve
9 months." 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant's
10 impairment must be "of such severity that he is not only unable to do his previous
11 work[,] but cannot, considering his age, education, and work experience, engage in
12 any other kind of substantial gainful work which exists in the national economy."
13 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential analysis to
15 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
16 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
17 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
18 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(b); 416.920(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
4 claimant suffers from "any impairment or combination of impairments which
5 significantly limits [his or her] physical or mental ability to do basic work
6 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
7 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
8 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
9 §§ 404.1520(c); 416.920(c).

10 At step three, the Commissioner compares the claimant's impairment to
11 severe impairments recognized by the Commissioner to be so severe as to preclude
12 a person from engaging in substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
14 severe than one of the enumerated impairments, the Commissioner must find the
15 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

16 If the severity of the claimant's impairment does not meet or exceed the
17 severity of the enumerated impairments, the Commissioner must pause to assess
18 the claimant's "residual functional capacity." Residual functional capacity (RFC),
19 defined generally as the claimant's ability to perform physical and mental work
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§

1 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
2 analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
6 If the claimant is capable of performing past relevant work, the Commissioner
7 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
8 If the claimant is incapable of performing such work, the analysis proceeds to step
9 five.

10 At step five, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing other work in the national economy.
12 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
13 the Commissioner must also consider vocational factors such as the claimant's age,
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
15 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
17 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
18 work, analysis concludes with a finding that the claimant is disabled and is
19 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
4 capable of performing other work; and (2) such work “exists in significant
5 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);
6 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 **ALJ’s FINDINGS**

8 Plaintiff applied for disability insurance benefits and supplemental security
9 income benefits on June 7, 2010, and June 21, 2010, respectively. Tr. 250-56. In
10 both applications, Plaintiff alleged a disability onset date of September 1, 2008.
11 Tr. 250, 252. The claims were denied initially, Tr. 144-50, and on reconsideration,
12 Tr. 151-55. Plaintiff appeared at a hearing before an Administrative Law Judge
13 (ALJ) on December 23, 2013.¹ Tr. 93-117. On January 15, 2014, the ALJ denied
14 Plaintiff’s claim. Tr. 38-46.

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17 ¹ This was the second hearing. A prior hearing was held December 21, 2011. Tr.
18 60-90. On December 29, 2011, the ALJ denied Plaintiff’s claim. Tr. 125-35. On
19 July 16, 2013, the Appeals Council vacated the ALJ’s decision and remanded for
20 further proceedings, including a new hearing and new decision. Tr. 141-43.

1 At the outset, the ALJ found that Plaintiff met the insured status
2 requirements of the Act with respect to his disability benefit claim through June
3 30, 2010. Tr. 41. At step one, the ALJ found that Plaintiff has not engaged in
4 substantial gainful activity since the alleged onset date, September 1, 2008. Tr.
5 41. At step two, the ALJ found that Plaintiff has the following severe
6 impairments: a personality disorder, not otherwise specified, with depression. Tr.
7 41. At step three, the ALJ found that Plaintiff does not have an impairment or
8 combination of impairments that meets or medically equals a listed impairment.
9 Tr. 41. The ALJ then concluded that Plaintiff has the RFC to perform a full range
10 of work at all exertional levels, but with the following nonexertional limitations:

11 the claimant is limited to one-to-three step tasks, with superficial contact
12 with the public and occasional contact with co-workers, and no more than
13 average production requirements. The undersigned adds: a low stress
14 working environment and working with objects/things rather than people.

15 Tr. 42. At step four, the ALJ found that Plaintiff is able to perform his past
16 relevant work as a store stocker and power machine operator/coater. Tr. 44.
17 Alternatively, at step five, the ALJ found that, considering Plaintiff's age,
18 education, work experience, RFC, and the vocational expert's testimony, there are
19 jobs in significant numbers in the national economy that Plaintiff could perform,
20 such as laundry worker and dishwasher. Tr. 45. On that basis, the ALJ concluded
that Plaintiff is not disabled as defined in the Social Security Act. Tr. 45-46.

1 On August 24, 2015, the Appeals Council denied review, Tr. 1-4, making
2 the ALJ's decision the Commissioner's final decision for purposes of judicial
3 review. See 42 U.S.C. § 1383(c) (3); 20 C.F.R. §§ 416.1481, 422.210.

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 him disability insurance benefits under Title II and supplemental security income
7 benefits under Title XVI of the Social Security Act. ECF No. 20. Plaintiff raises
8 the following issues for this Court's review:

9 1. Whether the Court has jurisdiction to consider if the ALJ correctly
10 followed the Appeals Council's remand order?²

11 2. Whether the ALJ properly considered Plaintiff's impairments at step two;
12 and

13 3. Whether the ALJ properly discredited Plaintiff's symptom claims.
14 ECF No. 20 at 11.

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19 ² Although Plaintiff lists the issue solely as a step two issue, for clarity the Court
20 separately addresses the propriety of the considering the remand order.

DISCUSSION

A. Court's Jurisdiction to Consider if ALJ Followed Appeals Council's Remand Order

First, Plaintiff contends the ALJ improperly failed to find that depression, and schizophrenia or psychotic disorder, are severe impairments at step two of the sequential evaluation. ECF Nos. 20 at 12-14, 26 at 2-3. As an initial matter, Plaintiff contends that because the ALJ previously found that schizophrenia was a severe impairment, and on remand the Appeals Council directed the ALJ to make a new step four determination, the ALJ erred in the current decision by reconsidering whether impairments were severe at step two.

The Court does not have jurisdiction to consider whether the ALJ properly followed the directions of the Appeals Council on remand. The Ninth Circuit has held that the Appeals Council's denial of a second request for review deprives the district court of jurisdiction to review any failure by the ALJ to follow a prior remand order. *See Tyler v. Astrue*, 305 F.App'x 331, 332 (9th Cir. 2008) (unpublished) ("The district court properly declined to evaluate whether the ALJ's second decision satisfied the demands of the Appeals Council's remand . . . [F]ederal courts only have jurisdiction to review the final decisions of administrative agencies. When the Appeals Council denied review of the ALJ's second decision, it made that decision final, and declined to find that the ALJ had not complied with its remand instructions.") (internal citations omitted); *see also* ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 9

1 *Conlee v. Colvin*, 31 F. Supp. 3d 1165, 1175 (E.D. Wash. March 31, 2014); *Boyd*
2 *v. Astrue*, No. C10-1552, 2011 WL 3881488, at *2 (W.D. Wash. July 18, 2011)
3 (“Whether an ALJ complies with an Appeals Council remand order is an internal
4 agency matter which arises before the issuance of the agency’s final decision.
5 Section 405(g) does not provide this Court with authority to review intermediate
6 agency decisions that occur during the administrative review process.”); *Thompson*
7 *v. Astrue*, No. EDCV, 09-1182, 2010 WL 2991488, at *2 (C.D. Cal. July 27, 2010)
8 (“[T]he Court’s role is to determine whether the ALJ’s final decision is supported
9 by substantial evidence, not whether the ALJ complied with the Appeals Council’s
10 remand order.”). The Appeals Council had an opportunity to address this issue in
11 the context of Plaintiff’s request for review of the ALJ’s second, current decision.
12 Here, however, the Appeals Council denied Plaintiff’s request for further review
13 following the second decision, finding “no reason under our rules to review the
14 [ALJ’s] decision.” Tr. 1. If the Appeals Council believed that an alleged violation
15 of its remand order was a material issue, it would have granted Plaintiff’s second
16 request for review and addressed the alleged violation in that context, i.e., the
17 Council would have ordered another remand rather than denying further review.

18 In addition to case law, both the regulatory language and plain terms of the
19 Appeals Council’s order support this view. The Appeals Council granted review
20 under the substantial evidence provision of the Social Security Administration’s

1 regulations (20 CFR §§ 404.970 and 416.1470). Tr. 141. Pursuant to 20 CFR §§
2 404.977 and 416.1477, the Appeals Council vacated the prior hearing decision. Tr.
3 141. The language “vacated” indicates that no findings in the vacated decision are
4 entitled to deference on remand.

5 Further, the Appeals Council’s order stated

6 [i]n compliance with the above, the Administrative Judge will offer the
7 claimant an opportunity for a hearing, address the evidence which was
8 submitted with the request for review, take any further action needed to
complete the administrative record and issue a new decision.

9 Tr. 142.

10 As the above-quoted language makes clear, the Appeals Council did not
11 direct the ALJ or the Court to give preclusive effect to the ALJ’s prior step two or
12 any other findings in the ALJ’s first decision.

13 Accordingly, Plaintiff’s contention with respect to alleged error by the ALJ
14 in failing to follow the Appeals Council’s remand instructions fails.

15 **B. Step Two**

16 Next, Plaintiff contends the ALJ erred at step two by failing to find that
17 depression, and psychotic disorder NOS or schizophrenia, were severe
18 impairments. ECF No. 20 at 12-14. Here, the ALJ found at step two that Plaintiff
19 suffers from personality disorder not otherwise specified (NOS) “with depression.”
20 Tr. 41. The Court interprets “with depression” to mean the ALJ found that

1 Plaintiff suffers from depressive symptoms, but that these symptoms do not meet
2 the criteria for a diagnosis of depression.

3 At step two of the sequential process, the ALJ must determine whether a
4 claimant suffers from a “severe” impairment, i.e., one that significantly limits his
5 or her physical or mental ability to do basic work activities. 20 C.F.R. §§
6 404.1520(c), 416.920(c). To show a severe impairment, the claimant must first
7 prove the existence of a physical or mental impairment by providing medical
8 evidence consisting of signs, symptoms, and laboratory findings; the claimant’s
9 own statement of symptoms alone will not suffice. 20 C.F.R. §§ 404.1508,
10 416.908. The fact that a medically determinable condition exists does not
11 automatically mean the symptoms are “severe” or “disabling” as defined by the
12 Social Security regulations. *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1159-
13 60 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v.*
14 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

15 An impairment may be found to be not severe when “medical evidence
16 establishes only a slight abnormality or a combination of slight abnormalities
17 which would have no more than a minimal effect on an individual’s ability to
18 work.” S.S.R. 85-28 at *3. Similarly, an impairment is not severe if it does not
19 significantly limit a claimant’s physical or mental ability to do basic work
20 activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). Basic work activities, in the

1 context of this case, include understanding, carrying out and remembering simple
2 instructions; responding appropriately to supervision, coworkers and usual work
3 situations; and dealing with changes in a routine work setting. 20 C.F.R. §§
4 404.1521(b), 416.921(b); S.S.R. 85-28 at *3.

5 Even when non-severe impairments exist, these impairments must be
6 considered in combination at step two to determine if, together, they have more
7 than a minimal effect on a claimant's ability to perform work activities. 20 C.F.R.
8 §§ 404.1523, 416.923. If impairments in combination have a significant effect on
9 a claimant's ability to do basic work activities, they must be considered throughout
10 the sequential evaluation process. *Id.*

11 If the ALJ erred by not finding an impairment severe at step two, reversal
12 may not be required if the step is resolved in the claimant's favor. *See Stout v.*
13 *Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch v.*
14 *Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). Here, the ALJ found personality
15 disorder NOS, with depression, was a severe mental impairment, Tr. 41, meaning
16 that the ALJ resolved step two in Plaintiff's favor. Therefore, even if the omission
17 of depression, and psychotic disorder or schizophrenia was erroneous, the error
18 was harmless.

19 In support of his step two argument, Plaintiff contends that the ALJ should
20 have adopted the diagnosis of Stephen Rubin, M.D., the reviewing medical expert

1 who testified at the first hearing. Tr. 62-72. Plaintiff contends that Dr. Rubin
2 diagnosed schizophrenia, paranoid type, or a psychotic disorder.³ ECF No. 20 at

3 _____
4 ³ However, as noted, the fact that a medically determinable condition, or diagnosis,
5 exists does not automatically mean that the symptoms are “severe” or “disabling”
6 as defined by the Social Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-
7 60; *Fair*, 885 F.2d at 603; *Key*, 754 F.2d at 1549-50. Here, Dr. Rubin’s opinion
8 does not support greater limitations than assessed by the ALJ. Dr. Rubin testified
9 that there is no external corroboration of schizophrenia. Tr. 67. He testified that if
10 Plaintiff’s psychotic symptoms had been severe, Dr. Rubin would have expected
11 that Plaintiff would be hospitalized or incarcerated at some point, and neither had
12 occurred. Tr. 68. Dr. Rubin noted that the record does not show difficulties
13 resulting from psychotic symptoms or from depression, Tr. 68; and “there isn’t a
14 lot of clear behavioral evidence” of the severity of Plaintiff’s delusions. Tr. 71.
15 Dr. Rubin concluded that Plaintiff’s symptoms “don’t seem to have given him a
16 great deal of trouble[.]” Tr. 128 (ALJ’s first decision) (citing Tr. 68). Dr. Rubin
17 further observed that, although Plaintiff has reported he feels that his grandparents
18 are going to harm him, he has continued to live with them, contradicting the
19 alleged severity of the impairment. Tr. 70-71; *see also* Tr. 371 (in September
20 2010, Plaintiff told evaluator Dr. Thompson that he had lived with his grandparents

13-14 (citing Tr. 67-71). Plaintiff notes that the ALJ inconsistently purported to adopt and incorporate Dr. Rubin's assessment in the current decision, Tr. 41, but, after the first decision, the ALJ came to partially disagree with Dr. Rubin because the ALJ no longer found that schizophrenia (or a psychotic disorder) was a severe impairment at step two. Because the ALJ found in Plaintiff's favor at step two, as noted, any error is harmless.

The ALJ's revised step two determination is supported by the record. The ALJ found that the diagnosis of schizophrenia or other psychotic disorder had not been corroborated between the first and second hearings. Tr. 41. The ALJ gave several reasons supported by the record for finding that the prior diagnosis was not corroborated.

First, in support of this finding, the ALJ found that there were unexplained gaps in Plaintiff's treatment, an indication that any psychotic impairment was not as severe as alleged. Tr. 43. Medical evidence is a relevant factor in determining the severity of a claimant's impairments. *Rollins v. Massanari*, 261 F.3d 853, 857

for six years). Dr. Rubin also noted that some of Plaintiff's activities, including the ability to go to counseling, and having expressed a desire to go to college, further called into question the severity of Plaintiff's allegedly disabling agoraphobia and other limitations. Tr. 72.

(9th Cir. 2001); 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Here, while the ALJ found there were unexplained treatment gaps, Tr. 43, she did not cite to specific records. The record supports the finding. For example, Plaintiff attended counseling from April 2010 to November 2010, a period of about seven months, Tr. 410-18, Tr. 425, and Plaintiff then did not attend counseling after November 5, 2010 until April 2011, a period of about five months. Tr. 431-37. Similarly, although Plaintiff saw his primary care physician, Daniel Moullet, M.D., at various times throughout the record, very few appointments were related to mental health concerns.⁴

Second, the ALJ found that other treating records do not support finding that schizophrenia or other psychotic disorder is severe. Tr. 43. For example, in June 2010, treating physician Michael Snook, M.D., described Plaintiff's schizophrenia

⁴ See, e.g., Tr. 355 (on December 31, 2009, Plaintiff complained of a cough and was "very pleasant"); Tr. 352 (on February 10, 2010, Plaintiff admitted that he had not taken psychotropic medication for three weeks because he did not think he needed it; Dr. Moullet opined that bronchial pneumonia was resolving); Tr. 347 (on June 15, 2010, Plaintiff and Dr. Snook opined that Plaintiff's schizophrenia symptoms were fairly well-controlled); Tr. 346 (on July 27, 2010, Plaintiff followed up for high cholesterol).

1 as fairly well-controlled. Tr. 43 (citing Tr. 347). The effectiveness of medication
2 and treatment is a relevant factor in determining the severity of a claimant's
3 symptoms. 20 C.F.R. § 404.1529(c)(3), 616.929(c)(3); *see Warre v. Commissioner*
4 *of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (Conditions effectively
5 controlled with medication are not disabling for purposes of determining eligibility
6 for benefits). Dr. Snook noted that Plaintiff described delusions and hallucinations
7 "but [he] feel[s] they are controlled." Tr. 43 (citing 347) (Dr. Snook diagnosed
8 dental caries, muscle tension headaches, and schizophrenia; he further opined that
9 schizophrenia was "fairly well controlled."). The ALJ also found, as another
10 example, that at an evaluation in February 2012, Plaintiff told Clark Ashworth,
11 Ph.D., that he had not had any hallucinations since 2010 because he was on
12 medication. Tr. 43 (citing Tr. 495).

13 Third, the ALJ found that Plaintiff's examinations have yielded scores that
14 suggest malingering, another indication that Plaintiff's psychotic impairments are
15 not as severe as alleged. Tr. 43 (citing Tr. 371) (in September 2010, examining
16 psychologist Renee Thompson, Psy. D., noted that Plaintiff's scores in October
17 2009 "had suggested malingering and [Plaintiff's] psychosis disorder required
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1 confirmation.⁵”). The ALJ then found that at Dr. Thompson’s own evaluation
2 about a year later, in September 2010, she opined that evidence of malingering or
3 factitious⁶ behavior may have been present. Dr. Thompson found, for example,
4 that Plaintiff’s M-FAST⁷ scores were even more elevated in 2010 than they had
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7 ⁵ Dr. Thompson noted that Plaintiff underwent the October 2009 evaluation to
8 determine whether he qualified for GAU short-term disability; the diagnosis of
9 psychotic disorder NOS was historical and based on prescribed antipsychotic
10 medication; moreover, the diagnosis was provisional, requiring confirmation; rule
11 out malingering, personality disorder NOS. Tr. 41 (citing Tr. 371). Dr. Thompson
12 further explained that Plaintiff’s October 2009 M-FAST results suggested
13 malingering and the MMPI was invalid. Tr. 41 (citing Tr. 371).

14 ⁶ Malingering means fabricating or exaggerating symptoms of any mental or
15 physical disorders for personal gain. <https://www.ncbi.nlm.nih.gov>. Factitious, on
16 the other hand, means not spontaneous or natural; artificial; contrived, but with no
17 motive for personal gain. www.dictionary.com/browse/factitious.

18 ⁷ The M-FAST is the Miller Forensic Assessment of Symptoms Test. Dr.
19 Thompson noted that the typical cutoff score is 6; however, in October 2009,
20 Plaintiff scored 13. Tr. 371. *See Tederman v. Colvin*, 2:14-CV-132-JTR, 2015

1 been in 2009, indicating that again Plaintiff had greatly exaggerated his symptoms.
2 Tr. 43 (citing Tr. 372). Similarly, Dr. Thompson observed that “[i]mpression
3 management to appear impaired is noted.” Tr. 372. An ALJ may permissibly rely
4 on evidence of exaggeration as diminishing the credibility of a claimant’s
5 complaints, *see Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001), and on
6 testimony from physicians or third parties concerning the nature, severity, and
7 effect of the claimant’s condition. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th
8 Cir. 2002). The ALJ also found, as another example, that Dr. Thompson observed
9 that Plaintiff was unable to provide specific, and sometimes general, information
10 about depression, anxiety or anger; Plaintiff endorsed schizophrenia in a
11 “memorized, list form”; and Plaintiff did not appear anxious, depressed, or
12 psychotic -- all indicating that any impairment was not severe and was not
13 corroborated during Dr. Thompson’s examination. Tr. 43 (citing Tr. 372).
14 Moreover, in February 2012, examining psychologist Clark Ashworth, Ph.D.,
15 noted that Plaintiff’s MMPI results again were invalid. Tr. 499. The ALJ’s
16 determination that her prior step two finding (of a diagnosis of schizophrenia or a
17 psychotic disorder) was not corroborated is supported by the medical evidence.

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19 WL 7721210 at *5 (E.D. Wash. November 27, 2015 (psychologist noted an M-
20 FAST score of 9 is “significantly elevated”).

1 More importantly, although the ALJ did not adopt the same diagnoses at step
2 two as in the first decision, she assessed *a more restrictive RFC* in the current
3 decision – meaning that the ALJ took into account all of the evidence of mental
4 impairments and included the resulting limitations in the RFC.⁸ Therefore, even if
5 the ALJ erred by not finding schizophrenia or a psychotic disorder was a severe
6 impairment, the error is also harmless because the limitations attributable to those
7 impairments and supported by the evidence were incorporated into the RFC.
8 “Even when part of an ALJ’s five-step analysis is not linguistically completely
9 clear or exhaustively complete, or precisely factually accurate, some errors are
10 legally harmless, such as errors which do not affect the ultimate result of the
11 analysis.” *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th
12 Cir. 2008) (citing *Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir. 2007)); *Curry v.*
13 *Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990); *Booz v. Sec’y of Health and Human*
14 *Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984). Here, Plaintiff generally contends
15 that he “is much more limited than the ALJ determined[,]” ECF No. 20 at 11, but
16 Plaintiff has failed to cite any evidence that establishes greater limitations than
17 ultimately included in the RFC. Moreover, in this case, Plaintiff was not only

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19 ⁸ The ALJ amended the prior RFC by adding that Plaintiff requires “a low stress
20 working environment and working with objects/things rather than people.” Tr. 42.

1 unharmed, he actually benefitted, from the ALJ's changed step two findings
2 because the ALJ assessed a more restrictive RFC in the second decision.

3 The ALJ is responsible for determining credibility and resolving conflicts in
4 medical testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)
5 (Where medical reports are inconclusive, “ ‘questions of credibility and resolution
6 of conflicts in the testimony are solely functions of the Secretary.’ ”). When the
7 evidence before the ALJ is subject to more than one rational interpretation, the
8 court must defer to the ALJ's conclusion. *Baston v. Comm'r of Soc. Sec. Admin.*,
9 359 F.3d 1190, 1193 (9th Cir. 2004) (“if evidence exists to support more than one
10 rational interpretation, we must defer to the Commissioner's decision[.]”) (citing
11 *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)).

12 Here, the ALJ's step two determination is a rational determination supported
13 by the record and free of harmful error.

14 **C. Adverse Credibility Finding**

15 Plaintiff faults the ALJ for failing to provide specific findings with clear and
16 convincing reasons for discrediting his symptom claims. ECF No. 20 at 14.

17 An ALJ engages in a two-step analysis to determine whether a claimant's
18 testimony regarding subjective pain or symptoms is credible. “First, the ALJ must
19 determine whether there is objective medical evidence of an underlying
20 impairment which could reasonably be expected to produce the pain or other

1 symptoms alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
2 “The claimant is not required to show that [his] impairment could reasonably be
3 expected to cause the severity of the symptom [he] has alleged; [he] need only
4 show that it could reasonably have caused some degree of the symptom.” *Vasquez*
5 *v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

6 Second, “[i]f the claimant meets the first test and there is no evidence of
7 malinger, the ALJ can only reject the claimant’s testimony about the severity of
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
9 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). “General findings are
11 insufficient; rather, the ALJ must identify what testimony is not credible and what
12 evidence undermines the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81
13 F.3d 821, 834 (9th Cir. 1995); *Thomas*, 278 F.3d at 958 (“[T]he ALJ must make a
14 credibility determination with findings sufficiently specific to permit the court to
15 conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”)). “The
16 clear and convincing [evidence] standard is the most demanding required in Social
17 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting
18 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

19 In making an adverse credibility determination, the ALJ may consider, *inter*
20 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the

1 claimant's testimony or between his testimony and his conduct; (3) the claimant's
2 daily living activities; (4) the claimant's work record; and (5) testimony from
3 physicians or third parties concerning the nature, severity, and effect of the
4 claimant's condition. *Thomas*, 278 F.3d at 958-59.

5 In challenging the ALJ's credibility finding, Plaintiff cites only to the ALJ's
6 first decision. ECF No. 20 at 15-16 (citing Tr. 132-33). Because the first decision
7 was vacated by the Appeals Council, it is irrelevant and therefore unnecessary for
8 the Court's consideration.

9 This Court finds the ALJ's second decision provided specific, clear, and
10 convincing reasons for finding that not all of Plaintiff's symptom allegations were
11 credible. Tr. 44.

12 *1. Minimal Treatment Sought*

13 The ALJ found the degree of mental health limitation Plaintiff alleged was
14 inconsistent with the minimal treatment sought; as noted, the ALJ found that there
15 were large unexplained gaps in treatment. Tr. 43. The medical treatment a
16 Plaintiff seeks to relieve his symptoms is a relevant factor in evaluating the
17 intensity and persistence of symptoms. 20 C.F.R. §§416.929(c)(3)(iv), (v). "[I]n
18 assessing a claimant's credibility, the ALJ may properly rely on 'unexplained or
19 inadequately explained failure to seek treatment or to follow a prescribed course of
20 treatment.'" *Molina*, 674 F.3d at 1113 (quoting *Tommasetti v. Astrue*, 533 F.3d

1 1035, 1039 (9th Cir. 2008)). The ALJ found that although Plaintiff alleged he
2 suffered severe symptoms beginning in 2008, unexplained infrequent treatment for
3 these symptoms undermines Plaintiff's claims. Tr. 43 (the ALJ observed that there
4 were large gaps in Plaintiff's treatment); *see also* Tr. 134 (in the first decision, the
5 ALJ found that Plaintiff did not seek mental health treatment for approximately
6 eight months, from August 2009 until April 2010. Tr. 398, 410. Plaintiff fails to
7 challenge this reason, thus, the argument is waived on appeal. *See Carmickle*, 533
8 F.3d at 1161 n. 2 (failure to challenge an ALJ's negative credibility finding on
9 appeal waives any challenge).

10 2. Evidence of Exaggeration

11 Next, the ALJ discounted Plaintiff's testimony because at least two
12 physicians suggested that Plaintiff exaggerated his symptoms. Tr. 43. The
13 tendency to exaggerate is a permissible reason for discounting a Plaintiff's
14 credibility. *See Tonapetyan*, 242 F.3d at 1148 (the ALJ appropriately considered
15 Plaintiff's tendency to exaggerate when assessing Plaintiff's credibility, which was
16 shown in a doctor's observation that Plaintiff was uncooperative during cognitive
17 testing but was "much better" when giving reasons for being unable to work); *see*
18 *also Thomas*, 278 F.3d at 959 (An ALJ may properly rely on a claimant's efforts to
19 impede accurate testing of a claimant's limitations when finding a claimant less
20 than credible).

1 The ALJ found, for example, that in September 2010, examining
2 psychologist Dr. Thompson reported that Plaintiff's October 2009 scores had
3 indicated malingering and a diagnosis of psychotic disorder required confirmation.
4 Tr. 43 (citing Tr. 371). Dr. Thompson opined that Plaintiff's October 2009 M-
5 FAST scores suggested malingering, and although Plaintiff completed an MMPI,⁹
6 also in October 2009, those results were invalid. Tr. 43 (citing Tr. 371). The ALJ
7 found, as another example, that Dr. Thompson opined that Plaintiff endorsed even
8 more items on the M-FAST in 2010 than he had in 2009, revealing that Plaintiff
9 exaggerated his symptoms. Tr. 43 (citing Tr. 372) (Dr. Thompson further
10 observed that Plaintiff's impression management "to appear impaired is noted.").
11 Moreover, the ALJ found, by way of further example, that on two occasions,
12 treatment providers found that (after Plaintiff heard the symptomology of other
13 disorders, bipolar disorder and a brain tumor), Plaintiff then wanted to endorse
14 those symptoms, another likely indication that his reporting was less than credible.
15 Tr. 43 (citing Tr. 347) (In June 2010, treating physician Dr. Snook noted Plaintiff
16 reported that he was worried he had a brain tumor after seeing symptoms on
17 television that frightened him; however, Dr. Snook opined that Plaintiff had no

18
19 ⁹ In February 2012, Dr. Ashworth opined that Plaintiff's MMPI results again were
20 invalid. Tr. 499.

1 symptoms of a brain tumor). Similarly, the ALJ found that, also in June 2010,
2 Plaintiff told a treating counselor he thought that he had bipolar disorder because
3 he heard someone talking about it in the hall.¹⁰ Plaintiff did not challenge these
4 findings, thus, the argument is waived. *See Carmickle*, 533 F.3d at 1161 n. 2.

5 Because an ALJ may account for a Plaintiff's exaggeration of symptoms and
6 behavior during an evaluation or treatment in assessing credibility, this was a
7 specific, clear and convincing reason to discredit Plaintiff's testimony.

8 *3. Improvement with Medication*

9 Next, the ALJ found that Plaintiff's claims lacked credibility because
10 Plaintiff's condition improved with medication. Tr. 43. The effectiveness of
11 medication and treatment is a relevant factor in determining the severity of a
12 claimant's symptoms. 20 C.F.R. § 404.1529(c)(3), 416.929(c)(3); *see Warre*, 439
13 F.3d at 1006 (Conditions effectively controlled with medication are not disabling
14 for purposes of determining eligibility for benefits) (internal citations omitted); *see*
15 *also Tommasetti*, 533 F.3d at 1040 (a favorable response to treatment can
16 undermine a claimant's complaints of debilitating pain or other severe limitations).

17 The ALJ found that treatment records, including Plaintiff's statements to
18 _____

19 ¹⁰ The ALJ's citation is incorrect, and appears to be a harmless scrivener's error.
20 Plaintiff's statement is at Tr. 415.

1 providers, consistently demonstrated improvement in symptoms when Plaintiff
2 took prescribed psychotropic medications. For example, the ALJ found treating
3 physician Dr. Snook opined that Plaintiff's schizophrenia was decently controlled.
4 Tr. 43 (citing 347) (In June 2010, Dr. Snook reported that Plaintiff's schizophrenia
5 was fairly well controlled). Significantly, in 2012, Plaintiff reported that he had
6 experienced no hallucinations since taking medication. Tr. 43 (citing Tr. 495) (in
7 February 2012, Plaintiff told evaluating physician Dr. Ashworth that he had no
8 hallucinations since 2010 because he was on medication).

9 The ALJ provided another specific, clear and convincing reason for finding
10 Plaintiff's statements less than credible.

11 *4. Failure to Report Symptoms*

12 The ALJ found that Plaintiff failed to consistently report symptoms or
13 limitations of a psychotic disorder or schizophrenia, or depression, during
14 evaluations. Tr. 43. Subjective testimony cannot be rejected solely because it is
15 not corroborated by objective medical findings, but medical evidence is a relevant
16 factor in determining the severity of a claimant's impairments. *Rollins*, 261 F.3d at
17 857; *see also Burch*, 400 F.3d at 681. The ALJ found, for example, that at an
18 evaluation in February 2012, despite Dr. Ashworth's direct solicitation, Plaintiff
19 failed to endorse any significant symptomology or limitations. Tr. 43 (citing Tr.
20 496) (the ALJ found Plaintiff reported only that he sleeps late, stays in his room at

1 his grandparents' home, checks Facebook, and performs limited household chores;
2 Plaintiff otherwise failed to report any significant limitations or symptoms).
3 Because an ALJ may discount pain and symptom testimony based on lack of
4 medical evidence, as long as it is not the sole basis for discounting a claimant's
5 testimony, the ALJ did not err when she found Plaintiff's complaints exceeded and
6 were not supported by objective evidence, including his own reports to providers.

7 Plaintiff contends that the ALJ when she found him less than credible
8 because (1) he was cited for driving while under the influence of intoxicants
9 (DUI); (2) state evaluators pondered whether Plaintiff's paranoia symptoms were
10 due to substance use; (3) Plaintiff did not disclose substance abuse or the program
11 he attended after his DUI; and (4) Plaintiff stated that marijuana made him
12 paranoid and he used methamphetamine. ECF No. 20 at 15 (citing Tr. 132-33).

13 Plaintiff's record citation is to the ALJ's first decision, which, as discussed,
14 was vacated by the Appeals Council. Accordingly, the ALJ was not required to
15 discuss these reasons as they were not relevant.

16 In sum, despite Plaintiff's statements to the contrary, the ALJ provided
17 several specific, clear, and convincing reasons for rejecting Plaintiff's testimony.
18 *See Ghanim*, 763 F.3d at 1163.

19 CONCLUSION

20 After review the Court finds the ALJ's decision is supported by substantial

evidence and free of harmful legal error.

IT IS ORDERED:

1. Plaintiff's motion for summary judgment, ECF No. 20, is **DENIED**.

2. Defendant's motion for summary judgment, ECF No. 25, is **GRANTED**.

The District Court Executive is directed to file this Order, provide copies to counsel, enter judgment in favor of defendant and **CLOSE** the file.

DATED this 23rd day of February, 2017.

s/ Mary K. Dimke

MARY K. DIMKE
U.S. MAGISTRATE JUDGE